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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 19, 1966.

OPINION BELOW

The court of appeals filed no opinion, other than that contained in its judgment (Appendix A, *infra*, pp. 19–21), which is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1966 (Appendix A, *infra*, pp. 19–21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Trade Commission is authorized and directed to enforce Section 7 of the amended Clayton Act by issuing complaints and, after appropriate hearings, divestiture orders. Any persons or firm against whom such an order is directed may seek judicial review of the order in the federal court of appeals for the circuit in which he resides or does business or in which the violation occurred. The question presented is whether the court of appeals has power under the "all writs" statute (28 U.S.C. 1651(a)) to issue a preliminary injunction preserving the *status quo* pending completion of the proceeding before the Commission.

STATUTES INVOLVED

The pertinent portions of 28 U.S.C. 1651, and of Sections 7 and 11 of the Clayton Act, 15 U.S.C. 18 and 21, are printed in Appendix B, *infra*, pp. 22–24.

STATEMENT

On December 13, 1965, Dean Foods Company and Bowman Dairy Company entered into an agreement (Ex. B)[1] which provided that Bowman would sell to Dean all Bowman plants and equipment, the Bowman name, "the benefit of all relationships with customers and suppliers," all customer and supplier lists, and various other tangible and intangible assets. On De-

[1] The record in this case consists (besides orders) of affidavits and other exhibits filed in support of the pleadings in the court of appeals, this being an original action in that court. The Commission's affidavits and exhibits are here designated "Ex."

cember 22, 1965, the Federal Trade Commission, pursuant to Section 11(b) of the Clayton Act, as amended, 15 U.S.C. 21(b), issued a complaint charging that the agreement violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.[2] The complaint alleged that Dean was approximately the twelfth largest dairy company in the United States, with total sales in 1964 of $73 million, and that Bowman was approximately the eleventh largest dairy company, with total sales in that year of $77 million (Ex. A, pp. 2–3); that in 1964 Bowman was the largest or second largest seller of packaged milk in the Chicago area, "one of the largest markets in the United States for the consumption of packaged milk" (*id.*, p. 5), with 16 percent of all sales in that area, and Dean the third or fourth largest with approximately 7 percent of all such sales; that the four largest dairy companies in the area had a combined market share of more than 40 percent (*id.*, pp. 5–6); and that the effect of Dean's acquisition of Bowman would be to lessen competition substantially, in violation of Section 7 (*id.*, pp. 7–8).

The agreement between Dean and Bowman provided (Ex. B, p. 5) that the transfer of assets thereunder would take place on January 3, 1966 (later extended by the parties to January 10). On December 30, 1965, the Commission filed a petition in the Court of Appeals for the Seventh Circuit seeking an order under 28 U.S.C. 1651(a) enjoining Dean and

[2] And also Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, which proscribes "unfair methods of competition."

Bowman from taking any steps to carry out the agreement pending completion of the Commission's adjudication of its complaint. The petition stated (p. 6) that, "[i]n the circumstances, it is probable that the Federal Trade Commission will enter an order finding a violation" of Section 7, and that "the imminent consummation of this acquisition will prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." (*Id.*, p. 4.)

Attached to the Commission's petition (and to its reply memorandum) were affidavits reciting the factual support for the allegations of the complaint, and alleging that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57 (Ex. I), and that, within the last four months alone, at least four more such firms had gone out of the market—two as a result of acquisitions (Ex. C, p. 4). Furthermore, according to the affidavits, Dean had told the Commission's staff that shortly after it acquired Bowman it would dispose of the latter's retail home delivery milk routes, consolidate the operations of the two companies, and close various Bowman plants (Ex. D, p. 3); in addition, under the agreement Bowman would retain more than 25 percent of its total assets (principally cash and marketable securities), which it would presumably distribute to its stockholders (*ibid.*). Thus, it was alleged, if Dean carried out its plans for the disposition of Bowman's assets, it would be "virtually impossible" to restore Bowman as a "viable independ-

ent company * * *, even though the acquisition be subsequently adjudged unlawful" (*id.*, p. 4).

In its response to the Commission's petition, Dean did not dispute these statements. Dean contended, rather, that Bowman had concluded (1) that unless it could find a purchaser for its operating assets it would have to proceed to liquidate its business, owing to substantial operating losses sustained by it in recent years and (2) that half of its dairy activity in the Chicago area—the operation of retail home delivery routes—was no longer economical in view of supermarket competition. Dean also alleged that it feared it might presently lose its principal supermarket account and that it needed Bowman's supermarket accounts to offset this.

On January 4, 1966, the court of appeals entered a temporary restraining order enjoining the companies from consummating the acquisition until five days after the denial of any injunctive relief. On January 19, 1966, without deciding the merits of the Commission's petition, the court held that it had no power to grant the requested relief (Appendix A, *infra*, pp. 19–21). At the same time that the court dismissed the petition, it also dissolved the temporary restraining order, and three hours later Dean acquired title to Bowman's assets and began taking further steps to effectuate the merger fully. On January 24, 1966, Mr. Justice Clark, on application of the Solicitor General, entered an order staying most changes in the business and operation of Bowman pending decision on the petition for cer-

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tiorari which the Solicitor General stated he would file on the Commission's behalf. The order directed that this petition be filed by January 31, 1966.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit has held that it does not have the power to issue an order staying a merger pending an administrative proceeding by the Federal Trade Commission to determine the merger's legality. We believe that review of the court of appeals' decision by this Court is, in the circumstances, clearly warranted. First, the issue here is an important one in the Commission's enforcement of Section 7, since, as we show below, the court's ruling if upheld would disable the Commission from effectively proceeding in a significant number of important merger cases. Second, the court of appeals' decision is erroneous and appears inconsistent with the teachings of this Court. Third, the Seventh Circuit's decision in this case is in conflict with the Ninth Circuit's decision in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311, certiorari denied, 340 U.S. 883.

We emphasize that the only issue presented by this petition is one of judicial power—whether there are *any* circumstances in which a court of appeals may grant the kind of relief here sought. The court of appeals did not reach the question whether, assuming it had power to grant such relief, this was an appropriate case for exercising that power. Accordingly, if this Court decides to review the judgment below, and reverses it, the case will go back to the

court of appeals for a consideration of the merits of the Commission's petition.

1. Section 11(a) of the Clayton Act, as amended, 15 U.S.C. 21(a), gives the Federal Trade Commission[3] authority to enforce the provisions of the Act in all but the regulated sector of the economy. Section 11(b) provides that if the Commission has reason to believe that the Act has been or is being violated, it shall issue a complaint. If the Commission determines after appropriate hearings that a violation has been committed, it is directed to issue a remedial order, which is reviewable in the court of appeals for the circuit in which the party charged resides or does business or in which the violation occurred. Since, as this Court has pointed out (*United States* v. *du Pont & Co.*, 366 U.S. 316, 328–331), ordinarily the only effective remedy in the case of an illegal merger is an order requiring divestiture of the acquired properties, Section 11(b) expressly provides that upon finding a violation of Section 7 the Commission shall issue an order requiring the violator to divest itself of the stock or assets unlawfully held.

However, in the interval between the issuance of the Commission's complaint and the entry of its final order of divestiture, the parties remain free to take any action they wish with respect to the properties of the merging firms—for the issuance of the complaint does not stay consummation of the merger and the Commission has no power to issue a preliminary

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[3] Concurrently with the Department of Justice. See Section 15, 15 U.S.C. 25, and p. 14, *infra*.

injunction or stay *pendente lite*.[4] Thus, unless the Commission can invoke the aid of a court—as it sought to do here—to preserve the *status quo* pending the completion of the proceeding before it, there is nothing to prevent the acquiring firm from so altering the assets of the acquired firm as to make their eventual divestiture, and the restoration of the acquired firm as a viable competitor, impractical to the point of impossibility. This has happened before;[5] although we do not suggest that it is a problem in every case, it is plainly a serious, and not an isolated, obstacle to the effective enforcement of Section 7 by the Commission. The present case graphically illustrates the nature of the problem.

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[4] Even the Commission's final order is not effective until affirmed by a court of appeals or until the time for seeking judicial review has elapsed. However, Section 11(c) empowers the court of appeals, once a petition for review of the Commission's order has been filed with it, to "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite."

[5] For example, in *Ekco Products Co.*, F.T.C. Docket 8122, affirmed, 347 F. 2d 745 (C.A. 7). Challenged in that case were acquisitions by Ekco of McClintock Manufacturing Company and of part of the assets of Blackman Stamping and Manufacturing Company. After the acquisitions, and before the Commission's proceeding challenging them was completed, the assets acquired from Blackman were sold off, and the most important assets were actually destroyed. As for McClintock, the plant in which its manufacturing facilities had been located at the time of the acquisition was sublet to third parties, and its operations consolidated with Ekco's. The Commission did not attempt to order divestiture of the Blackman assets, and while it did order divestiture of the McClintock assets, its order has not yet been carried out.

Bowman, the acquired company, is the first or second ranking seller of packaged milk in the Chicago area,[6] with a market share of 16 percent. Dean, the acquiring company, ranks third or fourth in that market, with a market share of 7 percent. As a result of the merger, Dean became the leading seller in the market by a substantial margin, and there has been a substantial increase in the concentration of an already highly concentrated market; the 42 percent of sales formerly accounted for by the first four sellers will now, as a result of the merger, be controlled by the first three—and this in a market that has shown a sharp decline in the number of independent competitors (see p. 4, *supra*. These facts clearly demonstrate *prima facie* illegality under the decisions of this Court. See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *United States* v. *Aluminum Co. of America*, 377 U.S. 271; *United States* v. *Continental Can Co.*, 378 U.S. 441.[7]

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[6] There appears to be no dispute that packaged milk is the relevant line of commerce and the Chicago area the relevant section of the country in which to test the competitive effects of the acquisition.

[7] In rebuttal, Dean asserted below that Bowman is a "failing company" which its own management decided to remove from the market. But the facts alleged by Dean do not bring the case within the limited exception defined in *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, and *United States* v. *Diebold, Inc.*, 369 U.S. 654. For the failing-company rule to apply, a defendant must show, first, that the acquired company is in acute danger of imminent bankruptcy, and, second, that the acquiring company is the only available purchaser. Neither was shown here. Bowman was not facing bankruptcy, but had a $10 million earned surplus (Ex. E). And Dean did not show that an alternative purchaser—acqui-

If, as appears likely, the Dean-Bowman merger is found to violate Section 7, effective relief would require that Dean divest the assets acquired in the merger on terms that would re-establish Bowman as a viable firm and effective competitor in the Chicago packaged milk market. If the Commission's order required anything less, "the Government has won a lawsuit and lost a cause" (*International Salt Co.* v. *United States,* 332 U.S. 392, 401). However, unless the companies are enjoined from going forward with their present plans to dismember Bowman, it appears that the necessary relief could not possibly be obtained. Dean does not deny the Commission's allegations that it will shortly consolidate the operations of the two companies and close various Bowman plants. The result of these steps will be the complete destruction of Bowman as a going concern under circumstances making it impossible, as a practical matter, to reconstitute it at some later time as an independent competitor.

Hence it is urgently necessary to enjoin dismemberment of Bowman pending the administrative proceeding to determine the legality of the merger. As noted earlier, such wholesale dismemberment of acquired firms is not unique in the experience of the Commission, and it poses a recurrent problem of major dimensions to the Commission in its enforcement of the merger law. Thus there can be, we think, little doubt

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sition by whom would not have such serious anti-competitive effects as the Dean-Bowman merger—was not available. On the contrary, the existence of at least one other potential purchaser was shown by an affidavit of that firm (Ex. F).

of the importance of the question presented here; the more difficult question is whether the courts of appeals have the power invoked by the Commission.

2. No statute in terms authorizes a court of appeals (or any other tribunal) to issue, in advance of a final Commission order in a Section 7 case, a stay or injunction designed to assure that the Commission's ability to enter an effective remedial order will not be defeated by action of the parties to the merger *pendente lite*. However, we think the courts of appeals have the power to issue such a stay under 28 U.S.C. 1651(a), which empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

It is well established in the decisions of this Court that, even in the absence of an express statutory grant, there is, by virtue of Section 1651(a), "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 671, n. 22.[8] Courts of appeals, of course, have this power. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 425.[9]

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[8] In so saying, the Court in *Arrow* cited the *Transamerica* decision of the Ninth Circuit, which, as we point out below (pp. 15–17), is directly contrary to the Seventh Circuit's decision in this case.

[9] In *Whitney*, too, the Court cited *Transamerica* with approval. See n. 8, *supra*.

And since an order under Section 1651(a) may be issued in advance of the final order of the lower court or agency (*Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 25; *McClellan* v. *Carland*, 217 U.S. 268), a court having potential appellate jurisdiction may, at the request of the government agency involved, issue an injunction preserving the *status quo* pending final determination by the agency for the purpose of ensuring that the agency will be able to enter an effective order reviewable by the court. *Public Utilities Commission* v. *Capital Transit Co.*, 214 F. 2d 242 (C.A. D.C.); *West India Fruit & S.S. Co.* v. *Seatrain Lines*, 170 F. 2d 775 (C.A. 2); cf. *United States* v. *Parrott*, 27 Fed. Cas. 416, 423 (No. 15998, C.C.N.D. Cal.); *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568 (C.C.S.D. Cal.).

These decisions, and the principles underlying them, clearly support the court of appeals' jurisdiction to grant the relief requested by the Federal Trade Commission in this case. The Court of Appeals for the Seventh Circuit is one of the courts to which a Commission order of divestiture could be appealed.[10] And the contemplated actions of the parties to the merger, unless enjoined by the court, could well defeat or impair that jurisdiction, since if the parties took steps which made divestiture impractical or impossible, it is apparent that the Commission could not enter a fully effective remedial order. In these circumstances, an order enjoining the parties to the merger from alter-

[10] Both parties to the merger reside and do business within the Seventh Circuit and the alleged violation occurred there. See Section 11(c) of the Clayton Act, as amended, 15 U.S.C. 21(c).

ing the *status quo* in order to prevent irreparable injury to the public interest would clearly be an "appropriate" measure in aid of the court of appeals' appellate jurisdiction,[11] and, in light of the decisions we have cited, a settled equity usage as well.

The court of appeals disputed none of the foregoing propositions. It based its dismissal of the Commission's petition largely on Congress' failure to act upon proposals for new legislation which would have expressly authorized interim relief against mergers challenged by the Commission. But legislative inaction of this sort is not a reliable indication of the existing state of the law. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 17. It is especially unreliable here, for the proposals before Congress differed in significant respects from the position urged in this case on the basis of Section 1651(a).[12]

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[11] A writ in aid of jurisdiction is appropriate not only to prevent literal ouster of such jurisdiction but, equally, to prevent its impairment by any change in the *status quo* which substantially lessens the effectiveness of the ultimate judgment. *E.g.*, *Continental Ill. Nat. Bank* v. *Chicago, R.I. & P. Ry.*, 294 U.S. 648, 675; *Looney* v. *Eastern Texas R.R.*, 247 U.S. 214, 221.

[12] The bills in the 84th Congress, H.R. 9424, S. 3341 and S. 3424, involved a requirement that corporations notify the Commission prior to any merger; in the event that the Commission disapproved the merger, the bills would have permitted the Commission then to apply to the district courts for temporary restraining orders and preliminary injunctions. The bills in the 89th Congress, H.R. 49 and H.R. 1574, would have permitted the *Commission* to issue temporary cease-and-desist orders in all cases. Neither type of bill would authorize the Commission to seek relief from a court of appeals having potential jurisdiction of the Commission's proceeding, as under Section 1651(a).

Nor does the scheme of enforcement established by Congress in the Clayton Act indicate any purpose to curtail the courts of appeals' authority under Section 1651(a). While under Sections 15 and 16 of the Clayton Act, 15 U.S.C. 25 and 26, the district courts are authorized to grant preliminary relief in actions brought by the Department of Justice or by private parties to prevent or restrain violations of the Act, no inference can be drawn from this grant of authority that the courts of appeals were to be denied their historic powers under Section 1651(a) in cases brought by the Federal Trade Commission.[13] Had there been no Section 15 or 16, the only enforcement provision in the Act would have been Section 11 (15 U.S.C. 21), which authorizes various regulatory agencies (including the Federal Trade Commission) to enforce the Act administratively. It was in order to give the district courts concurrent jurisdiction with those agencies to enforce the antitrust laws that Congress included Sections 15 and 16. Far from being designed to oust the Federal Trade Commission from any jurisdiction in respect to the Clayton Act, these sections were intended only to confer standing on the Department of Justice and private litigants to bring antitrust cases under that Act.

[13] We also think it would be improper to draw such an inference from Section 13 of the Federal Trade Commission Act, 15 U.S.C. 53, which empowers the Commission to seek a preliminary injunction in the district court against certain false advertisements. This provision was added many years after the original Clayton Act to deal with the special problem of misrepresentation in the promotion of food, drugs, cosmetics, and therapeutic devices.

Surely it would be anomalous for the availability of relief *pendente lite* to depend on whether suit under the Act was brought by the Department of Justice or the Federal Trade Commission. Congress, which made careful and deliberate provision for vesting concurrent responsibility for enforcing the provisions of the Clayton Act in the two agencies,[14] cannot reasonably be thought to have intended to create a huge disparity in the enforcement capabilities of the agencies by denying the Commission all possibility of ever obtaining a preliminary injunction. Before such an anomalous result should obtain, there would have to be an explicit affirmative indication that Congress so intended. *Scripps-Howard Radio, Inc., supra.*

3. The same position urged by the Commission in the court of appeals here, and rejected by that court, was adopted by the Court of Appeals for the Ninth Circuit in *Board of Governors* v. *Transamerica*

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[14] See, *e.g.*, *Trade Comm'n* v. *Cement Institute*, 333 U.S. 683, 692–693; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 310, n. 13; *United States Alkali Assn.* v. *United States*, 325 U.S. 196, 208–209. Under the informal arrangements between the agencies, the Federal Trade Commission has primary responsibility for enforcing Section 7 in (among others) the dairy industry. The Commission has brought and tried a number of dairy merger cases, and in its recent decision in one of them, *Beatrice Foods Co.*, Docket 6653, has laid down comprehensive guidelines to merger legality in the industry. The experience accumulated by the Commission in such cases would largely be wasted, and the division of responsibility between the Commission and the Department of Justice impaired, if the Commission were unable to proceed effectively in dairy cases, like that at bar, where there is an urgent need for preliminary relief against the merger.

Corp., 184 F. 2d 311, certiorari denied, 340 U.S. 883. In that case, the Federal Reserve Board, pursuant to its enforcement duties under Section 11 of the Clayton Act,[15] issued a Section 7 complaint challenging a stock acquisition, and applied to the court of appeals for a preliminary injunction to preserve the *status quo* pending completion of the Board's proceeding by prohibiting the bank from using its stock control to acquire the assets of the acquired bank. Since, under the law as it existed prior to the 1950 amendments to Sections 7 and 11 of the Clayton Act, the Federal Reserve Board did not in all circumstances have power to order divestiture of acquired assets (see *Arrow-Hart & H. Co.* v. *Federal Trade Commission*, 291 U.S. 587, 599), the effect of the proposed transfer of assets to the acquiring company might have been to prevent the Board from entering an effective remedial order with respect to the challenged stock acquisition.

Comparing the situation before it to that of a court confronted by a threat to destroy or remove "a *res in custodia legis*" (184 F. 2d at 315), the court of appeals held that it had the power under Section 1651 (a) to issue, and that it should, in the circumstances, issue, an injunction against the consummation of the merger to protect its appellate jurisdiction over the yet-to-be-issued final order of the Board. The *Transamerica* decision thus affirmed the proposition rejected by the court of appeals in this case—that the review-

[15] Section 11 directs the Federal Reserve Board to enforce the Act against banks, under the same procedures applicable to the Trade Commission.

ing court may enter an order against a merger allegedly in violation of Section 7 of the Clayton Act in order to prevent changes from being made to the acquired company that would thwart effective relief at the close of the administrative proceeding.

To be sure, the conduct enjoined in *Transamerica*—the transfer of the acquired firm's assets to the acquiring firm—threatened to prevent the Board from entering, not merely an effective order, but any order. We do not consider this difference between the cases to be crucial, however, since it is settled that an injunction may issue under Section 1651(a) to protect the reviewing court's jurisdiction from impairment as well as total ouster (see p. 13, n. 11, *supra*). In practical terms, there seems no difference between a wholly inadequate order and no order at all. In principle, too, the basic issue in *Transamerica* and the present case is the same—whether there are any circumstances in which the Board or Commission may obtain a preliminary injunction against the effectuation of a merger pending the administrative proceeding on the agency's complaint. Thus it is that in *Federal Trade Commission* v. *International Paper Co.*, 241 F. 2d 372, a case identical to that at bar, the Second Circuit, in holding against the Commission, acknowledged a conflict with the view of the Ninth Circuit in the *Transamerica* case.

CONCLUSION

The decision below involves an important question of judicial power to act in an area where courts and agencies play a complementary role. There is a con-

flict among circuits on a question that bears directly on the Federal Trade Commission's power to carry out its role effectively in the enforcement of the antitrust laws. We believe that the decision below also conflicts with views expressed by this Court. The petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted.

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JANUARY 1966.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Circuit Judges ELMER J. SCHNACKENBERG, LATHAM CASTLE, and LUTHER M. SWYGERT

No. 15493

FEDERAL TRADE COMMISSION, PETITIONER

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, RESPONDENTS.

ORDER

Federal Trade Commission, petitioner herein, filed its petition in this court on December 30, 1965 praying for a preliminary injunction, a temporary restraining order and other relief in aid of the jurisdiction of this court, under 15 U.S.C. §§ 21(c) and 45(c), to review final orders of the Federal Trade Commission, and therein represented to this court that the question presented was "whether this Court should exercise its discretion to grant equitable relief to preserve the status quo *pendente lite*, where the respondents will imminently consummate a merger (1) which will probably violate the antitrust laws, and (2) against which the Commission's ability to enter an effective order will probably be seriously impaired, unless the respondents are appropriately restrained by this court."

According to petitioner, the statutes involved are: the All Writs Act, 28 U.S.C. § 1651(a); the Clayton Act, §§ 18 [§ 7] and 21(c) [§ 11(c)], 15 U.S.C.; and the Federal Trade Commission Act, § 45(a)(1) [§ 5(a)(1)], and (c) [§ 5(c)], 15 U.S.C.

This court entered on January 4, 1966, a temporary restraining order herein pursuant to the petition therefor filed by the Commission, in which it was charged that a complaint had been filed by the Commission against the respondents Dean and Bowman, instituting the administrative proceeding now pending before the Commission, in respect to their agreement for the sale of Bowman to Dean and charging that such agreement and acquisition are in violation of § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18 and 45(a)(1).

Said restraining order is still in full force and effect according to its terms and provisions, inasmuch as an emergency petition for preliminary injunction filed by said Commission is pending and unadjudicated at this date.

Dean Foods Company and Bowman Dairy Company, respondents, having filed herein on January 5, 1966 their brief challenging the authority of the Commission to obtain a preliminary injunction against a supposed violation of § 7 of the Clayton Act or § 5 of the Federal Trade Commission Act and asserting that the sole grant of enforcement authority of the Commission is contained in § 11 of the Clayton Act (15 U.S.C. § 21), which section provides only for the issuance of cease and desist orders after a full administrative hearing with review by a court of appeals and the Supreme Court before such orders become final; the court has considered the briefs and arguments of counsel, as well as various references to the records and proceedings in the Congress of

the United States, which reveal that in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission.

Inasmuch as no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and inasmuch as we now hold that the Commission did not have authority to institute this proceeding in this court, IT IS HEREBY ORDERED that the temporary restraining order issued herein is dissolved and the petition filed herein and this proceeding are dismissed.

ELMER J. SCHNACKENBERG,
Judge.

LATHAM CASTLE,
Judge.

LUTHER M. SWYGERT,
Judge.

A True Copy:
Teste:
KENNETH J. CARRICK,
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
JANUARY 19, 1966

APPENDIX B

STATUTES INVOLVED

Section 1651(a) of the Judicial Code, 28 U.S.C. 1651(a), provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, provides in pertinent part:

> (a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board

where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or

rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the maner and within the time fixed by said order. * * *

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. * * *

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